BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICKIE F. BILLIONIS	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,037,974
	)	
SUPERIOR INDUSTRIES	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 12, 2011, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on September 7, 2011. The Director appointed Gary Terrill to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Troy A. Unruh, of Pittsburg, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that the presumption of permanent total disability had been rebutted and claimant had a 3 percent permanent partial impairment to each lower extremity at the level of the foot.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the ALJ's findings as to the nature and extent of her disability. Claimant further contends the ALJ took improper judicial notice of the AMA *Guides*[1] and also assumed facts not in evidence. Claimant asks the Board to modify the Award and find she is permanently and totally disabled and/or has a 25 percent permanent partial impairment to each lower extremity.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Respondent argues that claimant did not prove she suffered a permanent impairment of either her right or left lower extremity. In the event the Board finds the claimant did suffer impairment to her feet, respondent asks that the Award be affirmed. The respondent argues the ALJ's use of the AMA *Guides* was proper because the Workers Compensation Act specifies the *Guides* are to be utilized in assessing impairment. Further, respondent asserts the ALJ did not err in taking judicial notice of respondent's plant closing.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability?

(2) Did the ALJ take improper judicial notice of the AMA *Guides*?

(3) Did the ALJ assume facts not in evidence when he stated that it did not appear claimant left her employment because of her injury?

FINDINGS OF FACT

Claimant worked for respondent for five years. Beginning in July 2007, she worked as a leak test operator, which required her to wear steel-toed shoes. She generally worked from 60 to 72 hours a week. She had never worn steel-toed shoes until she went to work for respondent and had no problems with her feet before having to wear the steel-toed shoes at respondent.

Claimant testified that she started having problems with her feet on or about July 18, 2007, while walking in the steel-toed shoes. The steel toe shoe would rub up against the top of her toes and when she pressed down on her foot, she could feel the steel in the bottom of her foot. She noticed severe numbness and tingling in her feet and pain in her toes and ankles. As she continued to work, her feet continued to get more painful and she had more numbness and tingling.

Claimant reported the injury to respondent, but respondent did not send her to a doctor. On her own, she went to see Dr. Rick Hudson. Dr. Hudson tried to make her some insoles and one time he mentioned surgery. Claimant also went to see Dr. Wilde, who told her the same thing as Dr. Hudson. Claimant said both Drs. Wilde and Hudson told her that her foot condition was due to the steel-toed shoes and being on the concrete floor 60 to 70 hours a week. Respondent eventually sent her to Dr. Bryan Hawkins. He made claimant an insole, which claimant said did not help her much. He indicated that claimant needed to see a pain management specialist and referred her to Dr. Andy Briggeman.

Claimant continued to work until October 16, 2008. After she stopped working at respondent and no longer had to wear steel-toed shoes, the condition in her feet got a little

better. She said she still has constant pain, but her pain level has decreased from a level 10 to probably an 8. She still has numbness and tingling in her feet.

Dr. Bryan Hawkins is a board certified orthopedic surgeon who specializes in problems associated with the lower extremities with a subspecialty in problems with feet and ankles. He first saw claimant on September 17, 2008. Claimant presented with bilateral foot pain. She did not describe an actual injury but stated she was required to wear steel-toed shoes and over the course of time began to develop pain in her feet.

Dr. Hawkins examined claimant's feet and found they were diffusely tender. They did not demonstrate any evidence of recent trauma or other problems. Claimant related to Dr. Hawkins that both her feet hurt, but he found no objective structural findings that went along with the pain. He also said that claimant's symmetrical pain was unusual; it is more common to injure oneself on one side or the other. Dr. Hawkins said it was rare for people to have equal pain on both sides, even with a diagnosis of metatarsalgia.

Dr. Hawkins recommended claimant have tests to see if he could find a cause of her pain. She was set up for an MRI scan of her feet to check for structural problems and had blood studies to screen for arthritis. The MRI showed there was a stress response in the third metatarsal in her right foot. Dr. Hawkins said it is fairly common for people to have stress reactions in the bones of the feet from walking and standing. He said claimant's stress response would not explain the degree of pain that she has. There were no findings on the MRI of claimant's left foot that would correlate with the degree of pain claimant was describing. The blood studies were all normal.

Dr. Hawkins diagnosed claimant with metatarsalgia, which he said basically was painful feet. He treated claimant symptomatically, meaning padding her feet; trying medications for inflammation, pain, and for nerve-related pain; and using orthotics (arch supports) to try to distribute pressure differently.

When Dr. Hawkins saw claimant in November 2008, she had received no relief of her symptoms with any of the treatment provided. Dr. Hawkins, however, continued claimant on medication. In January 2009, Dr. Hawkins sent her for an EMG and nerve conduction study to see if there was evidence of nerve involvement. The results of those studies were normal. Because there was nothing Dr. Hawkins could do from an orthopedic standpoint, he suggested claimant see a physical medicine rehabilitation specialist to treat her symptoms and referred her to Dr. Briggeman. The last time he saw claimant was on February 4, 2009, and at that time his diagnosis was still metatarsalgia.

Dr. Hawkins said that standing for long periods exacerbated claimant's condition. He opined that her work did not cause her injury but made her condition worse. He said that if a person has a problem related to standing and that person stops standing, he would expect that problem to get better. However, he saw claimant for some time after she quit working, and she repeatedly said her symptoms were no better.

Dr. Hawkins said that the condition for which claimant was diagnosed, metatarsalgia, is not described in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* [2] so he was left with the alternative of assigning a rating. He consulted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and, based on his years of experience and treatment, rated claimant as having a 1 percent impairment to the body as a whole. This rating was related to the exacerbation of claimant's condition by her work. Because claimant had no relief of any of her symptoms, he assigned a permanent restriction that she have a sedentary job.

Dr. Pedro Murati is board certified in physical medicine, electrodiagnosis and independent medical evaluations. He examined claimant on April 23, 2009, at the request of her attorney. Claimant told him she had numbness, tingling and constant pain in both feet. Due to the pain in her feet, she has pain in both ankles and knees. She said she walks on heels inside of both feet and cannot place her feet flat on the floor all the way. She occasionally has pain going up or down stairs in her right and left knee.

Claimant told Dr. Murati she was injured due to the repetitive nature of standing on concrete floors wearing steel-toed shoes for 60 to 72 hours weekly. She began to notice pain in her left foot in all her toes and later started to experience the pain in her right foot. At the time of her examination, she rated the pain in her feet as a level 9. Claimant denied any history of injury to her right or left knees, ankles or feet before her work-related injury.

After examining claimant, Dr. Murati diagnosed her with severe bilateral metatarsalgia and bilateral plantar fasciitis. It was his opinion that claimant's work activities at respondent, wearing steel toed shoes, working on concrete floors and carrying aluminum wheels during the workday was the cause of her injury. Dr. Murati said that claimant's problem is one he sees quite frequently with people who have to stand for long periods of time. He said the fact that claimant wore steel toed boots would not help the problem because they are not very flexible and can essentially squeeze the feet or not allow proper movement of the joints and the feet. That is what leads to the metatarsalgia. Dr. Murati recommended that claimant continue to use anti-inflammatory medication, massage both feet, and avoid prolonged standing. Dr. Murati noted that the plant where claimant had been working closed and she was receiving unemployment benefits.

Based on the AMA *Guides*, Dr. Murati rated claimant as having a 5 percent right lower extremity impairment for the right plantar fasciitis. He also rated claimant as having a 21 percent impairment for the metatarsalgia of the right foot. Those combined for a 25 percent right lower extremity impairment. Dr. Murati also rated claimant as having a 5 percent left lower extremity impairment for the left plantar fasciitis and a 21 percent impairment for the metatarsalgia of the left foot. Those combined for a 25 percent

[2] It is noted that neither Dr. Hawkins impairment report nor his deposition testimony specifically identifies the 4th edition of the AMA *Guides*.

impairment to claimant's left lower extremity. Dr. Murati said claimant's impairments are the result of the work injuries at respondent each and every working day beginning on or about July 18, 2007. Dr. Murati said in rating claimant's right and left metatarsalgia, he used Table 64 of the AMA *Guides*. No portion of the AMA *Guides* was made a part of the record.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In *Casco*,[3] the Kansas Supreme Court held:

> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

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[3] *Casco v. Armour Swift-Eckrich*, 283 Kan. 509, Syl. ¶ 8, 154 P.3d 494 (2007).

K.S.A. 44-510d(a) states in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto . . . . If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> . . . .
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> (14) For the loss of a foot, 125 weeks.
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> . . . .
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> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

In *Dunfield,*[4] the Workers Compensation Board held:

> . . . [T]he ALJ, without prompting or request from the parties, took judicial notice of the entire contents of the *Guides*, something that this Board considers to be improper without any request or hearing. And after having done so, the ALJ quite clearly used portions of the *Guides* which he deemed relevant as a basis for disregarding the rating of preexisting impairment offered by Dr. Huston. He used the same rationale for disregarding the opinions expressed by Dr. Prostic.
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> It is not for the trier of fact to reach out and sweep into the record anything that he or she feels will help the parties try their case or justify his or her ultimate conclusions. The fact finder must only rely upon the evidence placed into the record by the parties, nothing more. Put in its simplest terms, the ALJ cannot go outside the record in deciding any given claim. Thus, the ALJ's adoption of the *Guides*, aside from those portions relied upon or referenced by the physicians in this case is excluded.

In Pierce,[5] the Kansas Court of Appeals stated:

> We recognize that an impairment rating must comply with the AMA Guides to be considered in determining the claimant's disability. But the Guides are just that–a guide to be used by the physician to arrive at an impairment of function. Two physicians can rate the same injuries using the AMA Guides and arrive at different impairment ratings. It is up to the physician using the AMA Guides to exercise

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[4] *Dunfield v. Stoneybrook Retirement Com.*, No. 1,031,568, 2008 WL 2354926, (Kan. WCAB May 21, 2008). See also *Dexter v. Atchison Casting Corp.*, No. 1,028,324, 2007 WL 740399, (Kan. WCAB Feb. 15, 2007); *Heller v. Conagra Foods*, No. 1,012,453, 2006 WL 1933429 (Kan. WCAB June 30, 2006).

[5] *Pierce v. L7 Corporation/Wilcox Painting*, No. 103,143, unpublished Court of Appeals opinion filed September 17, 2010, slip op. at 7.

some discretion to arrive at what the physician believes is an accurate impairment for the injuries sustained by the patient.

In *Watson*,[6] the court stated: "As the record does not conclusively demonstrate the prior functional impairment analysis was based on the AMA Guide [*sic*], the Board could properly decide to discredit or not consider such evidence."

ANALYSIS AND CONCLUSION

Claimant argues:

> ALJ Hursh expounds for two paragraphs on his interpretation of the *Guides*. The Respondent did not argue that Dr. Murati improperly used the Guides. Yet, ALJ Hursh took it upon himself to analyze the Guides and second guess the testimony of the doctors even when they had not been questioned in this manner by the opposing attorney. Based on the Court's imposition of its interpretation of the Guides, contrary to that of the experts testifying herein, found that the Claimant had sustained 3% impairment to each foot at the 125 week level.
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> Claimant would assert this is error and that the Court exceeded its jurisdiction by reviewing evidence not available. A fair and impartial application of the workers compensation act does not allow the ALJ to provide evidence for the Respondent. Rather, the job of the ALJ is to look at the evidence as presented by the parties and rule accordingly. It should also be noted that Judge Hursh further assumed facts not in evidence to rebut the presumption of permanent total disability in this case for the Respondent. Specifically, the Court found "the Claimant did leave the job in October, 2008 but the Court takes notice the Respondent closed its plant in the Fall of 2008, so it did not appear the Claimant left the employment because of the injury." There is no evidence in this record when the Respondent closed its plant. This improper use of Judicial Notice is consistent with the Court making decisions in this case not supported by actual evidence in the record.[7]

Claimant testified she last worked for respondent on October 16, 2008. Dr. Murati testified, without objection, that:

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[6] *Watson v. Spiegel, Inc.*, No. 85,108, unpublished Court of Appeals opinion filed June 1, 2001, slip. op. at 12. See also *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997); *Strickland v. Feed Mercantile*, No. 86,307, unpublished Court of Appeals opinion filed October 5, 2001; *Church v. White Star Comm. Coating*, No. 84,670, unpublished Court of Appeals opinion filed November 17, 2000; *Goodspeed v. McCambridge Bros. Const. Co.*, Docket No. 1,039,550, 2011 WL 2185251 (WCAB Kan. May 13, 2011); *South v. Tri State Tank Corp.*, Docket No. 1,044,608, 2010 WL 1445619 (WCAB Kan. March 11, 2010); *Roncone v. Lynn's Painting Serv.*, Docket No. 1,021,823, 2006 WL 2328076 (WCAB Kan. July 27, 2006; *Weddle v. Fairbanks Morse Pump*, Docket No. 1,002,764, 2004 WL 2046738 (WCAB Kan. August 6, 2004). But see *Ricks v. Catholic Care Center*, No. 95,979, unpublished Court of Appeals opinion filed January 26, 2007; *Rodriguez v. IBP, Inc.*, No. 85,679, unpublished Court of Appeals opinion filed June 22, 2001.

[7] Claimant's Brief at 2, filed May 13, 2011.

> [Claimant] was involved in a work-related injury during her employment with Superior Industries, where she was employed for approximately five years as a machine operator. She indicates that her facility has recently closed. She is unemployed at this time and is receiving unemployment with no work restrictions in place.[8]

The record fails to disclose the reason why claimant did not work for respondent after that date. However, the record does reflect that at some point, respondent's plant closed and claimant applied for and received unemployment compensation. Applying for unemployment benefits evidences an ability, at least in claimant's mind, to engage in substantial gainful employment. Moreover, claimant never testified that she was unable to work. No physician or vocational expert opined that claimant cannot perform full-time work in the open labor market. The only expert medical opinions restricting claimant's work activities are Dr. Hawkins' opinion that claimant have a sedentary job and Dr. Murati's restriction that she avoid prolonged standing, massage both feet, and use anti-inflammatory medication. The Board finds that claimant is not permanently and totally disabled from engaging in substantial gainful employment. Claimant's permanent impairment is limited to the schedules contained in K.S.A. 44-510d.

The Board further finds that the AMA *Guides* are not a part of the record, and the ALJ improperly utilized the AMA *Guides*. K.S.A. 44-510d requires the percentage of permanent impairment to be based upon the 4th edition of the AMA *Guides* if the impairment is contained therein. Dr. Hawkins said he consulted the AMA *Guides* and the condition he diagnosed was not contained therein. Dr. Hawkins did not say what edition of the AMA *Guides* he consulted. Furthermore, Dr. Hawkins' diagnosis, *i.e.*, metalarsalgia, is a condition of the foot. Yet Dr. Hawkins assigned an impairment rating to the claimant's body as a whole. For these reasons, the Board rejects Dr. Hawkins' impairment rating. The only physician's rating opinion which specifically references the statutorily mandated 4th edition of the AMA *Guides* is Dr. Murati's 25 percent impairment to each lower extremity. His diagnosis is bilateral metatarsalgia and plantar fascitis. These are both conditions of the foot. As such, claimant's permanent partial disability is limited by K.S.A. 44-510d to the level of the foot. The Board finds, based upon the record presented, that claimant's permanent impairment is 25 percent to each foot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated April 12, 2011, is modified as follows:

[8] Murati Depo. at 6.

RIGHT LOWER EXTREMITY

Claimant is entitled to 31.25 weeks of permanent partial disability compensation, at the rate of $413.35 per week, in the amount of $12,917.19 for a 25 percent loss of use of the right foot, making a total award of $12,917.19.

LEFT LOWER EXTREMITY

Claimant is entitled to 31.25 weeks of permanent partial disability compensation, at the rate of $413.35 per week, in the amount of $12,917.19 for a 25 percent loss of use of the left foot, making a total award of $12,917.19.

IT IS SO ORDERED.

Dated this _____ day of September, 2011.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Troy A. Unruh, Attorney for the Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge